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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 680

UNITED ARTISTS CORPORATION AND HAL ROACH STUDIOS, INC.,

Petitioners,

vs.

BOARD OF CENSORS OF THE CITY OF MEMPHIS AND THE SHELBY COUNTY BOARD OF CENSORS

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, United Artists Corporation and Hal Roach Studios, Inc., pray that a writ of certiorari issue to review the judgment and decision of the Supreme Court of Tennessee, the Tennessee court of last resort, entered in the above entitled case on December 17, 1949 (R. 49); and that this Court review and reverse the judgment and decision of that court.

Summary Statement

The basic issue presented is the constitutionality of previous restraint or censorship of talking motion pictures, a matter of far-reaching importance. Talking motion pictures are now universally recognized to be one of the most effective mediums for the dissemination of information and opinion. Their influence upon the masses of the people is so great as to rival, and perhaps even exceed, the influence of newspapers and other publications. Doubtless it was in recognition of this that this Court said, in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166, 92 L. ed. 1260, 1297, "Motion pictures • • • are included in the press whose freedom is guaranteed by the First Amendment."

It is a notorious fact that one of the first acts of any totalitarian police state is to establish ruthless partisan control over all channels and mediums for the dissemination of ideas and information. Such action is the very antithesis of the sound American doctrine "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

But if truth is to be tested "in the competition of the market" the channels for the communication and dissemination of information and opinion must be open to it, and not clogged by the petty despots of censorship, who only too often seek to "abridge the individual's liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider* v. *Irvington*, 308 U. S., 147, 160, 84 L. ed. 155, 164, (1939).

This case presents a particularly striking illustration of the evil inherent in censorship.

The case at bar had its inception in the action of the local censors of Memphis and Shelby County, Tennessee, acting under local municipal censorship laws adopted pursuant to enabling statutes enacted by the State, in censoring and banning the talking motion picture "Curley."

The picture "Curley" is a product of Petitioner Hal Roach Studios, Inc., and is a variation upon the structure and theme of the "Our Gang" comedies for which Hal Roach has long been famous. It is a light-hearted, juvenile comedy of the former "Our Gang" variety, and relates a simple story of how a young and pretty girl is about to assume a new job as a school teacher, how the pupils expect her to be stern and are apprehensive of the prospect of the new relationship, but how she gradually wins the affection of the children through her athletic prowess. Among the children in the cast is a little Negro whose part in the comedy is similar to that of the little Negro "Farina" in the former "Our Gang" comedies. Nothing in the picture constitutes the slightest threat to morals, safety, health or public welfare, nor is there anything in the picture which could possibly incite racial strife or discord. In short, the picture is perfectly innocuous, as the Court may readily see from the description of the picture set out in the record. (Amended Petition, R. 15-17).

Yet the local censors of Memphis and Shelby County did not so measure the picture. When it was submitted by Petitioners for censorship, incident to its being licensed for local exhibition, the picture was viewed, censored and banned, and thereby its exhibition within the limits of Memphis and Shelby County was prohibited.

The action of the local censors in censoring and banning the exhibition of the picture "Curley" is set forth in an

order, in letter form, from the Chairman of the local censor Boards, which is exactly as follows:

"CITY OF MEMPHIS

(SEAL)

MEMPHIS BOARD OF CENSORS

LLOYD T. BINFORD CHAIRMAN

LOCK DRAWER 62

1124 COMMERCE TITLE BLDG.

MRS. SID A. LAW

H. H. HONNOLL

COMMISSION GOVERNMENT

MEMPHIS, TENN.

AUGUST 9, 1947

"United Artists Corporation,
Saint Louis, Missouri.

GENTLEMEN:

The Memphis Board of Censors passes "The Marauders" and the Beebe Daniels Picture, but I am sorry to have to inform you that it was unable to approve your "Curley" picture with the little Negroes as the south does not permit negroes in white schools nor recognize social equality between the races even in children.

Yours truly,

(S.) LLOYD T. BINFORD,
Chairman" (R. 18).

Further light is thrown on the aforesaid action of the local censors by further facts alleged in the Amended Petition (R. 21-22), "that said Boards of Censors are purposely and intentionally pursuing a policy of censoring motion pictures and banning the exhibition thereof, or of

sequences and parts thereof, solely on the ground that members of the colored race appear therein, under the mistaken belief that the censoring and suppression of scenes in which members of the colored race appear in anything other than the most innocuous, banal and insipid of roles will contribute to class and racial harmony, and petitioners state that said Boards of Censors were actuated by said purpose and intention in the aforesaid action taken by it with respect to the motion picture 'Curley.' "

Petitioner Hal Roach Studios, Inc., as the producer of the picture, and Petitioner United Artists Corporation, as the distributor having the exclusive right to distribute the picture for local exhibition, then unavailingly sought judicial relief in the State courts from the aforesaid action of the local censors. In so doing they particularly sought to have the State courts adjudge that the right to produce, distribute and exhibit talking motion pictures is entitled to the enjoyment and protection of the fundamental right of freedom of speech and of the press to the same extent that such right is extended to any and all other mediums for the dissemination of information and opinion, and that any attempted restriction or limitation of the exercise of such rights through previous restraint or censorship, whether by legislative, city, or county action, be adjudged and decreed to be unconstitutional and void. In the State courts Petitioners particularly and expressly raised the issue that the local censorship laws, and the State enabling statutes under which local censorship was adopted, on their face and as construed and applied by the local censors in the particular instance, be adjudged and decreed to be in contravention of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States, as well as being in contravention to applicable provisions of the Constitution of Tennessee. (Amended Petition, R. 20-25; Motion for a New Trial, R.

33-38; Assignment of Errors in the Supreme Court of Tennessee, R. 41-49).

The case was heard in the State courts on the Amended Petition of Petitioners for judicial review of the action of the local censors by writ of certiorari, and on the motions to dismiss filed by respondents. Consequently the case presents no disputed questions of fact, the only factual issues presented being merely the inferences and conclusions properly to be drawn from the detailed facts averred in the verified Amended Petition filed in the State trial court by Petitioners.

Opinions Below

The opinion of the Supreme Court of Tennessee (R. 50-58) is reported in 225 S. W. (2d) 550, (Adv. Op. Feb. 7, 1950). The opinion of the trial court (Circuit Court of Shelby County, Tennessee), is not officially reported, but its opinion was incorporated in its judgment (R. 30-32).

The State Circuit Court (*nisi* court of general jurisdiction) appeared to rest its decision on the following grounds:

(a) That the local censorship laws applied only to local exhibition and that Petitioners are not so affected thereby as to have standing to challenge these laws, or to challenge the action of the local censors in censoring and banning the talking motion picture "Curley" (R. 31).

(b) That, if the foregoing be not true, then Petitioners must be adjudged to be "doing business" in Tennessee, and are barred from maintaining the action by reason of having failed to qualify to do business in Tennessee as foreign corporations (R. 31).

(c) With respect to the merits, the trial court seemingly treated the censorship laws and the action of the local censors as being constitutional and valid; and further

held that, under the ruling of the intermediate appellate court of Tennessee in *Binford* v. *Carline*, 9 Tenn. App. 364, (1928), the court was not concerned with nor permitted to pass on the soundness or accuracy of reasons assigned by the local censors with respect to the censoring and banning of the talking motion picture "Curley", and that with respect to all such matters the action of the local censors was final (R. 31-32).

(d) The trial court further refused to consider a visual and audible screening of the talking motion picture "Curley", although a print was tendered, together with facilities for its visible and audible screening. Exception was taken to this ruling, and the print of the picture was made a part of the technical record by being made an original exhibit to the bill of exceptions allowed by the trial court (R. 39-41). The picture, therefore, constitutes a part of the record now before this Honorable Court and, if need be, Petitioners will provide facilities for its visual and audible screening at such time and place as the Court may deem to be convenient.

By motion for a new trial in the trial court (R. 33-38), and by assignments of error on appeal to the Supreme Court of Tennessee (R. 41-49), Petitioners further and expressly raised the several Federal questions now relied upon, as well as questions of state law which no longer are material.

The Supreme Court of Tennessee, as expressly stated in its judgment entered on December 17, 1949, pursuant to the opinion decision rendered on December 17, 1949, overruled all of Petitioners' assignment of errors "except as indicated by the court in next to the last paragraph of the opinion filed", and affirmed the judgment of the trial court. Thus the Supreme Court of Tennessee apparently did not consider Petitioners' assignment of errors VII and VIII

(R. 45-46), to the effect that, under applicable state law, the trial court should have treated the case as being before it on statutory certiorari, carrying with it the right to a trial *de novo,* instead of the more limited remedy of common law certiorari. In this connection, the opinion of the Tennessee Supreme Court states:

> "We pretermit consideration of other assignments of error, based upon the trial judge's alleged hearing of the case under the common law writ of certiorari. The determinative questions have been considered by this Court upon the assumption that the fact stated in the letter from the Board to United Artists was true.
>
> "All assignments of error are overruled and the judgment of the trial court is affirmed" (R. 58).

The quoted paragraphs, when read in conjunction with the rejection of respondents' contention that the act of censorship and the letter form order were advisory and did not constitute official action (Op., R. 55, 58), clearly show that the Supreme Court of Tennessee treated the action of the local censors as being official action, and further did not question the form of remedy invoked in the State courts by Petitioners.

The difference in the form of remedies available in the State courts under common law certiorari, as distinguished from statutory certiorari, is immaterial to the proper determination of the Federal questions now presented. While the statutory writ, where available, carries with it the right to a trial *de novo,* it is the settled law in Tennessee that the action of administrative agencies and inferior tribunals is subject to judicial review under the common law writ. Cases announcing and illustrating this are too numerous for review, but attention is called to the illustrative case of *N. C. & St. L. Ry.* v. *Browning,* 176 Tenn. 245, 140 S. W. (2d) 781, affirmed 310 U. S. 362, 84 L. Ed. 1254.

As stated by the Supreme Court of Tennessee in *Groomes* v. *City of Nashville*, 176 Tenn., 391, 141 S. W. (2d) 899, "The Legislature did not and could not take away the common law writ of certiorari; hence the exception of illegality or want of jurisdiction, which are common law grounds for the issuance of writs of certiorari." And in that case, following the well settled rule in Tennessee, the court further expressly held that where an administrative board "acts illegally or without jurisdiction, its judgment may be reviewed upon the common law writ of certiorari."

Notwithstanding its holding that the action of the local censors constituted official action, and notwithstanding its recognition that the general state law permits judicial review of administrative action on the ground of illegality or want of jurisdiction, the Supreme Court of Tennessee failed and refused to sustain Petitioners' assignment of errors which raised the substantive Federal questions now presented.

In so doing the Supreme Court of Tennessee refused to adjudicate that previous restraint or censorship of talking motion pictures was unconstitutional, and seemingly further adjudged that Petitioners were without standing to question the validity of censorship in the particular case because (a) Petitioners allegedly were not so affected as to be entitled to make the question, and (b) that Petitioners had no standing in the State courts because they were foreign corporations who had not qualified to do business in Tennessee.

The Supreme Court did not, however, wholly pretermit the constitutional questions now presented. In its opinion the Court, by clear and necessary implication, upheld the constitutionality of previous restraint or censorship of talking motion pictures. This is shown, not only by the action of that Court in expressly overruling Petitioners' applicable

assignment of errors raising the question, but by the following pertinent excerpt from the Court's opinion:

> "Able counsel for the appellants have cited many cases in which the courts have dealt with the propositions relating to freedom of speech and the press. We are in no wise in disagreement with the appellants as to the fundamental principles announced in these decisions, and especially with the insistence that there is no authority in the law 'to use race or color as the sole legal basis for censorship of talking motion pictures.' " (R. 54.)

In so holding the Court necessarily upheld the constitutionality of previous restraint or censorship, since otherwise there would have been no point in expressly holding that a racial standard for the exercise of censorship would be illegal.

A further incidental but substantial effect of such a confused state of law is that interstate commerce in licensing pictures for local exhibition is effectively blocked without judicial recourse, because the action of the local censors in actually banning a particular picture totally destroys the market for the picture within the territory affected by censorship.

While Petitioners basically attack the constitutionality of the action of the local censors, and of the local censorship laws, on the ground that the fundamental freedom of speech and press was denied, the economic consequences proximately resulting from the challenged action are obvious, and are expressly set out in paragraph VIII of the Amended Petition as follows:

> "Since the Board of Censors has the power to close any theatre or place in which there is a public exhibition in violation of any order of the Board of Censors,

no motion picture exhibitor within Memphis or elsewhere within Shelby County will exhibit the motion picture 'Curley' or contract to exhibit the said motion picture, and the aforesaid action of Respondents makes the release and exhibition of the picture impossible within the City of Memphis or elsewhere within Shelby County" (R. 19).

Statutes Involved

The State enabling statutes authorizing the imposition of local censorship in the City of Memphis are Chapter 54 of the Private Acts of Tennessee for 1921, as amended by Chapter 394 of the Private Acts of Tennessee for 1929. The State enabling statutes authorizing the imposition of local censorship in Shelby County are Chapter 403 of the Private Acts of Tennessee for 1947. We do not deem particular reference to these Acts to be material, because they are merely a grant of power to the local municipalities to enact local censorship laws.

The local municipal censorship laws of the City of Memphis are Sections 1131 to 1139 of The Memphis Municipal Code, enacted by city ordinance, and are set forth verbatim in the Amended Petition (R. 7-9).

The local municipal censorship laws of Shelby County were enacted by resolution of the Quarterly County Court, and the resolution is set forth verbatim in the Amended Petition (R. 9-12).

These local censorship laws vest the local censors with "power to censor, supervise and regulate all public exhibitions, plays, motion pictures, performances, pantomimes or other representations" (R. 7-8, sec. 1133); provide that the local censors "shall also have power to prohibit any exhibition", etc., "which shall be of immoral, lewd or lascivious character" or which denounces, derides or seeks to "over-

throw the present form of national government" (R. 7-8, sec. 1133); provide that the local censors are "authorized to call for a preview of any such pictures, plays or exhibitions, if they so desire" (R. 8, sec. 1137); make violation of any order of the local censors unlawful (R. 8, sec. 1134); and expressly provide that the local censors shall have "power to close any theatre" for "violation of any lawful order" of the local censors (R. 8, sec. 1135).

The applicable State laws with respect to foreign corporations being required to become domesticated before doing business in Tennessee are Sections 4118 to 4129 of the Code of Tennessee (either the official 1932 edition or Williams Tennessee Code), and pertinent sections are set forth in the Appendix, *infra,* pages 31-32.

Jurisdiction

The opinion of the Supreme Court of Tennessee was rendered December 17, 1949, and the judgment on the opinion was entered on that date (R. 49, 50).

The jurisdiction of this Court is invoked under 62 Stat. 929 (1948), 28 U. S. C., Section 1257(3). The particular ground of jurisdiction is that in the proceedings in the Tennessee courts statutes of that State were drawn in question on the ground of their being repugnant to the Constitution of the United States, and on the ground that in said proceedings rights, privileges and immunities were specially set up and claimed by the Petitioners under the Constitution of the United States.

The case presents two phases of jurisdiction, and while there is some interrelation under the facts, each ground constitutes an adequate ground of jurisdiction:

(a) Questions relating to the constitutionality of the local censorship laws, both upon their face and as construed and

applied in the particular case, with respect to which the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States were expressly invoked and unavailingly relied upon by Petitioners in the State courts. (Amended Petition, R. 21-25; Motion for New Trial, R. 33-38; Assignment of Errors in the Supreme Court of Tennessee, R. 41-49.)

(b) The question of whether Petitioners, as foreign corporations, were doing business in Tennessee so as to be subject to the Tennessee laws requiring foreign corporations to become domesticated before doing business in Tennessee, with respect to which the "commerce clause" of Section 8 of Article I of the Constitution of the United States was expressly invoked and unavailingly relied upon by Petitioners in the State courts. (Amended Petition, R. 4-6, 13-14, 17-19; Motion for New Trial, R. 34-35, 38; Assignment of Errors in the Supreme Court of Tennessee, R. 48.) This ground of jurisdiction does not involve any disputed question of fact, but rests on the legal conclusion to be drawn from uncontroverted facts which entitle Petitioners to the immunity of the "commerce clause" and exempt them from the duty of qualifying as foreign corporations. These uncontroverted facts are set out in detail in the Amended Petition (R. 4-6, 13-15, 17-19), and are briefly reviewed, *infra,* pp. 22-26.

The Questions Presented

The following Federal questions are presented for decision by this Court:

(1) Are talking motion pictures such a medium for the dissemination of information and opinion as to be entitled to the protection of the fundamental right of freedom of speech and of the press; or, in other words, are state laws,

which provide for previous restraint or censorship of talking motion pictures, in derogation of the freedoms secured by the First Amendment and protected against State abridgment by the "due process" and "equal protection" clauses of the Fourteenth Amendment?

The State courts refused to adjudge that talking motion pictures are entitled to any such immunity. Error is assigned on this, and is expressly relied upon by Petitioners.

(2) Even though previous restraint or censorship be not unconstitutional *per se*, may race or color, or the fact that Negro children appear along with white children in school room scenes, constitute a valid ground on which a talking motion picture may be censored and its exhibition banned?

While the Supreme Court of Tennessee expressed the opinion that it was unlawful "to use race or color as the sole legal basis for censorship of talking motion pictures", the Court failed and refused to review and reverse the action of the local censors in banning the exhibition of the talking motion picture "Curley" on racial grounds. Error is assigned on this, and is expressly relied upon by Petitioners.

(3) Where the producer and the distributor of a talking motion picture, who have a property right in it and whose pecuniary reward therefrom is derived solely from rentals paid by local exhibitors for the privilege of showing the picture on local exhibition, tender a picture to the local censors for censorship, the tender is accepted and the picture is actually censored and banned so that thereafter no contracts can be made for its local exhibition, are the producer and distributor, or either, so affected by such action as to have standing to challenge the validity of such action?

The State courts held that Petitioners were not so affected as to have standing to invoke constitutional rights or to challenge the official action taken by the local censors. Error

is assigned on this action of the State courts, and is expressly relied upon by Petitioners.

(4) Under the detailed facts set out in the Amended Petition (R. 4-6, 13-14, 17-19) were Petitioners, as foreign corporations, doing business in Tennessee so as to be subject to the Tennessee law requiring foreign corporations to become domesticated before doing business in Tennessee?

Petitioners invoked the immunity of the "commerce clause" of Section 8 of Article I of the Constitution of the United States, but the claimed immunity was denied by the State courts solely on the basis of the detailed facts set out in the Amended Petition, and Petitioners were held to be without standing to maintain any action in the State courts because they had not become domesticated. Error is assigned on this, and is expressly relied upon by Petitioners.

(5) A corollary and novel question is presented. Whether a State, consistently with the First and Fourteenth Amendments of the Constitution of the United States, may require a foreign corporation to become domesticated as a condition precedent to its right to maintain an action in the State courts for the purpose of upholding its constitutional exercise of the right of freedom of speech and of the press?

The State courts denied Petitioners this right of immunity. Error is assigned on this, and is expressly relied on by Petitioners.

(6) Whether state courts can evade primary Federal constitutional issues by interposing non-Federal grounds of decision which, in substance and effect, deny fundamental constitutional rights?

With great deference, it is suggested that insofar as the decision of the Tennessee Supreme Court may be construed to stand on non-Federal grounds, the decision must be held to be subject to the infirmity of evasion. Error is assigned on this, and is expressly relied on by Petitioners.

Reasons for Granting Writ

> "Moving pictures • • • are included in the press whose freedom is guaranteed by the First Amendment."
>
> *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166, 92 L. ed. 1260, 1297 (1948).

Petitioners find themselves ostensibly within the scope of this protective pronouncement of this Court, but at the same time also find themselves in the unnatural position of having their basic constitutional rights substantially denied by state application of fine-spun technical doctrine. Petitioners do not believe, as this Court did not believe in *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357 (1931), that, where precious freedoms are involved, form will override substance, or technicalities will outweigh the operation and effect of the statute to be tested. In this petition for certiorari, this is the heart of the matter.

It is in this light, then, that we respectfully submit, in compliance with Rule 38(5), the following reasons for the allowance of the writ of certiorari in this case. In doing so it is our endeavor to make our statement of reasons sufficiently self explanatory that a further supporting brief is unnecessary.

(1) The Tennessee Supreme Court, in direct conflict with the case of *United States* v. *Paramount, supra*, and *Saia* v. *New York*, 334 U. S. 558, 92 L. ed. 1574 (1948), has refused to recognize that talking motion pictures are entitled to the immunity from censorship enjoyed by other mediums by which information and ideas are disseminated. The Tennessee Court lightly adverted to "the fundamental principles announced" in these cases, and others which Petitioners cited dealing "with the propositions relating to freedom . . . of the press." (Op., R. 54). But one of these fundamental propositions is that the dis-

semination of information and opinion shall be immune from previous restraint or censorship. While the Tennessee Court seemingly recognized that it is invalid to use race or color as the sole legal basis for censorship of talking motion pictures (R. 54), the Court, in substance, held that motion pictures are not immune from previous restraint or censorship, and definitely and expressly refused to hold to the contrary.

The major inarticulate premise of the Tennessee Supreme Court's decision is stated explicitly in *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U. S. 230, 59 L. ed. 552 (1915). That is: Motion pictures are not entitled to the immunity of freedom of speech and of the press. But the above quoted language of this Court in *United States* v. *Paramount, supra,* p. 16, would indicate that the decisions of this Court in *1915* in *Mutual* v. *Ohio, supra,* and *Mutual Film Corporation* v. *Hodges,* 236 U. S. 247, 59 L. ed. 561, rendered at a time when silent moving pictures were placed in a category with side shows and circuses, are not controlling when, as in the instant case, there is involved the present day talking motion picture. The present day talking motion picture no longer is to be treated as a curiosity, or as a mere innovation in the field of entertainment; but, as noted by Mr. Justice Black in his dissenting opinion in *Kovacs* v. *Cooper,* 336 U. S. 77, 101, 93 L. ed. 379, 394, it is one of the chief means by which ideas and beliefs are disseminated to the masses of people.

A further reason why the *Mutual* cases should be reconsidered is that they were decided a decade before this Court, commencing with *Gitlow* v. *New York,* 268 U. S. 652, 69 L. ed. 1138, definitely adopted the rule that the great freedoms secured by the Bill of Rights are protected against state abridgment by the Fourteenth Amendment.

This reconsideration is further demanded by the principles followed in *Home B. & L. Ass'n.* v. *Blaisdell,* 290

U. S. 398, 442, 78 L. ed. 413, 431, wherein the Court reiterated Chief Justice Marshall's warning "that it is *a constitution* we are expounding", and expressly rejected the contention that "what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time". This Court is urged, therefore, to reconsider its decisions in the *Mutual* cases, which cases are believed to have suffered from the erosion of time and change and no longer to rest on a firm foundation.

While vigorous protest doubtless will be made that the ending of censorship of talking motion pictures will mean the beginning of a period of unbridled license and lead to corruption of mind and morals, under settled law the removal of previous restraint does not mean the unlimited sanctioning of unwholesome publications or exhibitions. The answer is simply that the abuse can be punished under criminal laws, when and as abuse occurs in the particular instance. Subsequent punishment for abuse committed, instead of previous restraint, has long been adopted and recognized as proper procedure where fundamental freedoms are involved. *Schneider* v. *Irvington,* 308 U. S. 147, 164, L. ed. 155, 166; *De Jonge* v. *Oregon,* 299 U. S. 353, 364, 81 L. ed. 278, 284; *Thomas* v. *Collins,* 323 U. S. 516, 543, 89 L. ed. 430, 447; *2 Kent Comm.* 17; Report on the Virginia Resolutions, Madison's Works,* Vol. 4, p. 544.

For particularly informative discussions of censorship of talking motion pictures, see, Comment, 49 Yale L. J. 87 (1939); and Note, 39 Col. L. Rev. 1383 (1939).

(2) Distribution has long been considered essential to freedom of dissemination of ideas and information and the decision of the Tennessee Court, which denies the protection of the Fourteenth Amendment to a distributor of motion pictures, is in conflict with the decisions of this Court in *Winters* v. *New York,* 333 U. S. 507, 92 L. ed.

840, (1948); *Lovell* v. *Griffin,* 303 U. S. 444, 82 L. ed. 949 (1938); *Schneider* v. *Irvington,* 308 U. S. 147, 84 L. ed. 155 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296, 84 L. ed. 1213 (1940); *Jones* v. *Opelika,* 316 U. S. 600 (1942), 319 U. S. 103, 87 L. ed. 1290 (1943); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 87 L. ed. 1292 (1943); *Martin* v. *Struthers,* 319 U. S. 141, 87 L. ed. 1313 (1943); *Thomas* v. *Collins,* 323 U. S. 516, 89 L. ed. 430 (1945); *Marsh* v. *Alabama,* 326 U. S. 501, 90 L. ed. 265 (1946); *Saia* v. *New York,* 334 U. S. 558, 92 L. ed. 1574; *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, 80 L. ed. 660 (1936); *U. S.* v. *Paramount,* 334 U. S. 131, 166, 92 L. ed. 1260, 1297 (1948).

(3) The failure of the Tennessee Supreme Court to hold that the local censorship laws were invalid, on their face and as applied in this case, is believed to be in direct conflict with the decisions of this Court in *Near* v. *Minnesota,* 283 U. S. 697, 75 L. ed. 1357 (1931); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 249, 80 L. ed. 660, 668 (1936); *De Jonge* v. *Oregon,* 299 U. S. 353, 364, 81 L. ed. 279, 284 (1937); *Lovell* v. *Griffin,* 303 U. S. 444, 431, 82 L. ed. 949, 953 (1938); *Hague* v. *CIO,* 307 U. S. 496, 83 L. ed. 1423 (1939); *Schneider* v. *Irvington,* 308 U. S. 147, 160, 84 L. ed. 155, 164 (1939); *Thornhill* v. *Alabama,* 310 U. S. 88, 95, 84 L. ed. 1093, 1098 (1940); *Cantwell* v. *Connecticut,* 310 U. S. 296, 306, 84 L. ed. 1213, 1219 (1940); *A. F. of L.* v. *Swing,* 312 U. S. 321, 85 L. ed. 855 (1941); *Bridges* v. *California,* 314 U. S. 252, 263, 86 L. ed. 192, 203 (1941); *Jones* v. *Opelika,* 319 U. S. 103, 87 L. ed. 1290 (1943); *Jamison* v. *Texas,* 318 U. S. 418, 87 L. ed. 869 (1943); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 87 L. ed. 1292 (1943); *Martin* v. *Struthers,* 319 U. S. 141, 87 L. ed. 1313 (1943); *Douglas* v. *Jeanette,* 319 U. S. 157, 87 L. ed. 1324 (1943); *Thomas* v. *Collins,* 323 U. S. 516, 89 L. ed.

430 (1945); *Marsh* v. *Alabama,* 326 U. S. 501, 90 L. ed. 265 (1946); *Saia* v. *New York,* 334 U. S. 558, 92 L. ed. 1574 (1948); *Hannegan* v. *Esquire,* 327 U. S. 146, 151, 90 L. ed. 586 (1946); *Winters* v. *New York,* 333 U. S. 507, 92 L. ed. 840 (1948); *Terminiello* v. *City of Chicago,* 337 U. S. 1, (1949) 93 L. ed. 865 (Adv. Op. 1948).

(4) It is believed that it was the failure of the Tennessee courts to comprehend the far-reaching effect of these decisions, upholding and expounding the great freedoms, which impelled those courts to look narrowly to the fact that the penal sanctions prescribed under the local censorship laws were applicable only to local exhibition, and to conclude that Petitioners were not so affected as to have standing to challenge the validity of censorship. It is submitted, however, that in so doing the Tennessee courts wrongfully disregarded the economic consequences which Petitioners suffered as the proximate result of the acts of the local censors, and misunderstood and misapplied the controlling test prescribed in *Massachusetts* v. *Mellon,* 262 U. S. 442, 488, 67 L. ed. 1076, 1085. Applying this test to the case at bar, it is submitted that, by the detailed facts averred in the Amended Petition, Petitioners showed not only that local censorship was invalid, but that they had sustained direct injury as the result of the local censorship and banning of the talking motion picture "Curley," and not merely that they suffered in some indefinite way in common with people generally, or were merely seeking to invoke rights applicable only to other persons.

It is further submitted that the Tennessee courts ignored the well settled doctrine of this Court, as applied in *Near* v. *Minnesota,* 283 U. S. 697, 708, 75 L. ed. 1337, 1363, in which it was said that in cases involving freedom of speech

and of the press the "operation and effect" of the ordinance are decisive, rather than "mere details of procedure."

This same fundamental doctrine has found expression in *Schneider* v. *Irvington*, 308 U. S. 147, 161, 84 L. Ed. 155, 165 (1939) and in *Oyama* v. *California*, 332 U. S. 633, 636, 92 L. Ed. 249, 254 (1948). Especially in point are the cases of *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131 (1915) and *Pierce* v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070 (1925). In the *Truax* case this Court granted equitable relief to an employee who, though not within the sanction or penalties of an allegedly unconstitutional act, nevertheless was substantially affected thereby. In the *Pierce* case this Court permitted private schools to vindicate the rights of parents who were compelled, under the terms of an Oregon statute, to send their children to public schools. These are but examples of this Court's rigid refusal to allow constitutional rights to be frittered away by technical arguments, where parties are substantially and adversely affected by allegedly unconstitutional acts. (See also *Associated Industries* v. *Ickes*, 134 F. (2d), 694 (C.C.A. 2d 1943).

On the question of the standing of Petitioners to challenge the constitutionality of censorship, the case at bar is readily distinguishable from *Mutual Film Corp.* v. *Hodges*, 236 U. S. 247, 59 L. Ed. 561. In the first place, the *Hodges* case was decided in 1915, but only since the decision in 1925 of *Gitlow* v. *New York*, 268 U. S. 652, 69 L. Ed. 1138, has it been settled doctrine that the great freedoms secured by the First Amendment are protected against state abridgment by the Fourteenth Amendment. The significance of this is apparent from this Court's similar comment in *Bridges* v. *California*, 314 U. S. 252, 263, 267, 86 L. Ed. 192, 206.

Secondly, the issues presented in the *Hodges* case were totally unlike those presented in the case at bar. In the *Hodges* case a general attack on censorship was made by suit for injunction brought by one who had not been individually and directly affected by specific action previously taken by the censors. In the case at bar, suit is brought by corporations having a property interest in a particular picture, to review action actually taken by the censors, whereby the identical picture has been censored and banned and the local market for exhibition actually destroyed. (Amended Petition, par. VIII, R. 19).

To say that the producer and distributor, whose pecuniary reward from their property interest in the picture is derived from rental fees for local exhibition, are not substantially affected by the banning of the picture and the actual destruction of the local market for exhibition, is but to indulge in sheer technicalities without regard to substance and logical effect. Particularly in point is the holding in *U. S.* v. *Interstate Circuit,* 20 F. Supp. 868, 873, (aff'd. 306 U. S. 208, 83 L. Ed., 610) in which the District Court, while acknowledging that exhibition itself is local, nevertheless stressed the fact "that the film without the right of exhibition would be useless in either intra- or interstate economics."

(5) Further reason for the granting of the writ, and an additional and adequate ground of jurisdiction, is the holding by the Tennessee courts that Petitioners, as foreign corporations, have no standing to maintain any action in the State courts because they had not become domesticated under the foreign corporation laws of Tennessee. This holding denied Petitioners their asserted immunity under the "commerce clause" and is contrary to long settled principles. Furthermore, the effect of the holding extends beyond the issues in the case at bar. Under the penal sanctions imposed by section 4128 of the Code of

Tennessee (Appendix, *infra*, pages 31-32), it is unlawful for any foreign corporation to do business in Tennessee without becoming domesticated, and offending corporations are subject to a "penalty of not less than one hundred dollars nor more that five hundred dollars", and each day's offense "shall constitute a separate violation."

The holding of the Tennessee courts was made solely as a conclusion of law based on the uncontroverted facts alleged by Petitioners respecting the nature and scope of their activities. (Amended Petition, R. 4-6, 13-14, 17-19.)

In this connection, and with deference, it is suggested that in its opinion the Tennessee Supreme Court ignores certain pertinent facts and gives disproportionate weight to others, so that the factual predicate for its holding is distorted from that actually presented by the detailed facts averred in the Amended Petition. Cf. *Lloyd Thomas Co.* v. *Grosvenor*, 144 Tenn. 347, 233 S. W. 669, 671, (1921); *Burton Explosives* v. *Strider*, 158 S. W. (2d) 734, cert. den. (Tennessee Supreme Court 1942); *Deposit Bank* v. *Cherry*, 98 S. W. (2d) 525, cert. den. (Tennessee Supreme Court 1936).

For convenience of reference we are setting forth the following resume of the pertinent facts actually alleged in the Amended Petition.

Petitioner Hal Roach Studios, Inc., a foreign corporation with its place of business in California, is an independent producer of talking motion pictures. It contracted with the Petitioner, United Artists Corporation, a Delaware Corporation, to distribute the talking motion picture "Curley" throughout this country and elsewhere, and gave United Artists an exclusive distribution agency. No part of the production of the film took place in Tennessee. No contracts regarding the film were entered into in Tennessee. No delivery of film by Hal Roach Studios, Inc., or payments of any kind to it, were made in Tennessee. No agency or

office of Hal Roach Studios, Inc., is located in Tennessee. In short, Hal Roach Studios, Inc., its properties and its business, are wholly divorced from the State of Tennessee. (Amended Petition, R. 6.)

Petitioner United Artists Corporation is a foreign corporation engaged in business as an independent distributor of motion picture films. It maintains no office in Tennessee, and no films are stored in Tennessee. Salesmen of the corporation, all employees of branch offices located outside of Tennessee, solicit trade in Tennessee and resulting orders for films are transmitted to the branch office outside of Tennessee for approval and acceptance. Films leased for exhibition in Tennessee, pursuant to such lease contracts, are shipped to the exhibitor in Tennessee from the branch office located outside the state, and after exhibition are returned to the branch office by the exhibitor. The rental charges for films are collected and paid outside Tennessee to the branch office. (Amended Petition, R. 4-6.)

An additional fact relating to the activities of Petitioner United Artists, and one seemingly stressed by the State courts, is that in some instances rental charges on the lease of films consisted of flat fees, and in other instances consisted of a percentage of the *gross* receipts derived from local exhibition of the picture. In this respect the case at bar appears undistinguishable from this Court's holding in *United Artists Corporation* v. *James,* 305 U. S. 410, 411, 83 L. Ed. 256, 257, in which a similar percentage rental was held not to subject an otherwise interstate transaction to a state tax levied upon "every person engaged • • • within this state in the business of collecting income from the use of real or personal property."

A still further fact seemingly stressed by the State courts in support of their holding is that Petitioner United Artists

voluntarily submitted the picture "Curley" to the local censors for censorship. The circumstances and reasons for so doing are set forth in detail in the Amended Petition (R. 13-14, 17-19). It had become the administrative custom of the local censors to view pictures at the trade showing ordinarily held before contracts for exhibition were made, and exhibitors customarily did not enter into exhibition contracts for pictures until they had been cleared by the local censors. Petitioner United Artists, being then in the process of entering into license agreements with local exhibitors for the exhibition of the picture "Curley", forwarded the picture, along with another, from its St. Louis branch exchange to Memphis for the sole and express purpose of submitting it to the local censors and obtaining their approval. Having no screening facilities in Memphis, facilities of another distributor having a branch exchange in Memphis were utilized for the screening of the picture before the censors. This forwarding of the picture to Memphis for censorship was a thing wholly separate and apart from its local exhibition, because it was an occurrence precedent to entering into interstate license agreements with local exhibitors. (R. 13-14, 17-19.)

As particularly averred in the Amended Petition, Petitioner United Artists, "being then in course of entering into license agreements with exhibitors in Memphis and elsewhere in Shelby County", by letter from its St. Louis office notified the local censors that the picture would be submitted to them for preview in Memphis on August 5, 1947. This submission was accepted, along with that of other pictures submitted at the same time; the picture was reviewed, and thence returned to St. Louis, and the letter form of order censoring and banning the picture was forwarded by the local censors to Petitioner United Artists at its St. Louis office. (Amended Petition, pars. III, V and VIII (R. 13-14, 15-19).)

Clearly, therefore, the submission of the picture to censorship, in compliance with state police laws, cannot transmute into intrastate commerce a transaction which otherwise is interstate in character. Furthermore, a private trade showing, without admission charge, held for the purpose of soliciting interstate license contracts, is no different from the ordinary exhibition by a salesman of his samples for the purpose of soliciting orders for goods to be shipped in interstate commerce.

Such being the indisputable facts, it is submitted that the holding of the Tennessee courts is not only contrary to the holding of this Court in *United Artists Corporation* v. *James, supra,* and to the settled rule announced in *Robbins* v. *Taxing District,* 120 U. S. 489, 30 L. Ed. 694, but is further in conflict with the decisions of this Court in *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 54 L. Ed. 678 (1910); *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 59 L. Ed. 193 (1914); *Dahnke-Walker* v. *Bondurant,* 257 U. S. 282, 66 L. Ed. 239 (1921); *Furst* v. *Brewster,* 282 U. S. 493, 75 L. Ed. 478 (1931); *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 88 L. Ed. 1227 (1944); *U. S.* v. *Paramount Pictures,* 334 U. S. 131, 92 L. Ed. 1260 (1948); *Interstate Circuit, Inc.* v. *U. S.* 306 U. S. 208, 83 L. Ed. 610 (1939); *Paramount Famous-Lasky Corp.* v. *U. S.,* 282 U. S. 30, 75 L. Ed. 145 (1930); *U. S.* v. *First National Pictures, Inc.,* 282 U. S. 44, 75 L. Ed. 151 (1930); *Binderup* v. *Pathe Exchange, Inc.,* 263 U. S. 291, 68 L. Ed. 308 (1923).

Further authorities believed particularly in point, and to support Petitioners, are *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.,* 156 Fed. 1, 17, *cert. den.,* 212 U. S. 557, 53 L. Ed. 658; *Vulcan Steam Shovel Co.* v. *Flanders,* 205 Fed. 102; *Fox Film Corp.* v. *Trumbull,* 7 F. (2d) 715; 17 Fletcher, Cyc. Corp. secs. 8405-06 (Perm. Ed. 1933).

The failure of the Tennessee courts correctly to analyze the question, and properly to apply established and con-

trolling principles to the uncontroverted facts set out in the Amended Petition, is strongly suggested by the fact that the Tennessee courts made no distinction in their ruling between Petitioner Hal Roach Studios, Inc., and Petitioner United Artists Corporation. Yet under no possible theory can it be said that Petitioner Hal Roach Studios, Inc., was engaged in any business activities whatever in Tennessee, save merely to join with Petitioner United Artists Corporation in the institution of suit to challenge the action of the local censors in censoring the picture "Curley" and excluding it from exhibition in the local market.

Furthermore, the decision that United Artists was "doing business" in Tennessee, and therefore required to qualify, was clearly based on a misconception of the applicability of the two principal cases discussed by the Tennessee Supreme Court in its opinion: *Independent Warehouses, Inc.*, v. *Scheele*, 331 U. S. 70, 91 L. Ed. 1346 (1946), and *Tad Screen Advertising* v. *Oklahoma Tax Commission*, 126 F. (2d), 544 (C.C.A. 10th 1942). In these cases the only question was whether a state system of taxation constituted an undue burden on interstate commerce under the commerce clause. The qualification question was not passed on; and these cases, therefore, do not constitute authority as to the nature of business transactions which require qualification before access to state courts will be allowed. The question of "doing business" for revenue purposes is distinct from the question of "doing business" requiring qualification. See *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 92 L. Ed. 1832 (1947); 18 Fletcher, Cyc. Corp. Sec. 8712 (Perm. Ed. 1933).

The holding by the Tennessee Supreme Court, that "the film comes to rest in this state when it is exhibited at a local theatre for the enrichment of appellants" (Op., R. 56), ignores the fact that when the film allegedly comes to

rest in Tennessee it is there, not that Petitioners "may dispose of it either within the state, or for shipment elsewhere" (Op., R. 55-56), but is there temporarily in the possession of the exhibitor for the sole purpose of being exhibited by the exhibitor. It further ignores the fact that Petitioners are not engaged in any partnership or joint adventure with the exhibitor, and do not share in any profits or losses, but collect from the exhibitor a rental charge, which consists either of a flat sum or is measured by a percentage of GROSS receipts. It further ignores the fact that the license contract for the importation of the film into Tennessee is approved outside of Tennessee while the film is outside of Tennessee; that the film is transported in interstate commerce to the exhibitor pursuant to the license contract, and by the terms of the license contract the exhibitor is required immediately after local exhibition to return the film to the branch exchange located outside of Tennessee. (Amended Petition, pars. I and II, R. 4-6.)

(6) The Tennessee Court's holding that United Artists is under the duty to qualify before it can maintain this action presents the novel question to this Court, whether a foreign corporation may maintain an action in the courts of the State to vindicate its constitutional right to immunity from censorship, even though it has not complied with the State's requirement of qualification. Cf. *International Textbook Co.* v. *Pigg,* 217 U.S. 91, 54 L. Ed. 678 (1910); *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197, 59 L. Ed. 193 (1914); see *Jones* v. *Opelika,* 319 U.S. 103, 87 L. Ed. 1290 (1943); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 87 L. Ed. 1076, 1085 (1943).

(7) If Petitioners are denied their right to question the action of the local censors and the validity of the local censorship laws, then there is left no one with standing to raise the question in Tennessee. The Tennessee Supreme

Court has held, in effect, that the local censorship laws do not apply to distributors and distributors cannot, therefore, properly make the question. (R. 54.) The trial court held (R. 30-32), and it is the state of the law in Tennessee under *Binford* v. *Carline,* 9 Tenn. App. 364, that exhibitors have no constitutional right to exhibit a picture, the exhibition being a mere privilege. Error was assigned in the Tennessee Supreme Court on this, but the assignment was overruled. Therefore, under this state of the law in Tennessee, unwise and unconstitutional legislation can go unchallenged. We firmly believe that this Court will not permit the existence of such a legal "no-man's-land", whereby fundamental constitutional freedoms can be flouted and property rights can be denied without due process of law. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 69 L. Ed. 1070 (1925); *Fox Film Corporation* v. *Trumbull,* 7 F. (2d) 715 (D.C. Conn. 1925), appeal dismissed, 269 U. S. 597 (1925); *Shuman* v. *Pickert,* 277 Mich. 225, 269 N. W. 152 (1936).

(9) The Tennessee Supreme Court, though recognizing in the opening statement of the opinion that "This case involves the validity of the Private Acts creating the Board of Censors", etc. (Op., R. 50), nevertheless failed and refused to adjudge that local censorship, on its face and as applied in the particular instance, violated the great freedoms secured by the First Amendment and protected against state abridgment by the Fourteenth Amendment. With great deference, it is suggested that insofar as the holdings of the State courts may be said to have avoided the primary issue and to rest upon independent grounds of State law, the State courts must be considered as having sought to evade the principal issue by interposing unsubstantial non-Federal grounds. Such a contention would be in direct conflict with the well settled rule that State

courts cannot evade the primary constitutional issues by interposing non-Federal grounds which, in substance and effect, deny fundamental constitutional rights. *Ancient Egyptian Order of the Shrine* v. *Michaux,* 279 U. S. 737, 73 L. Ed. 931 (1928); *Fox River Paper Co.* v. *R. R. Commission of Wisconsin,* 274 U. S. 651, 71 L. Ed. 1279 (1926); *Ward* v. *Love County,* 253 U. S. 17, 64 L. Ed. 751 (1919).

WHEREFORE, your Petitioners respectfully pray that this petition for a writ of certiorari be granted, and that this Court's writ of certiorari issue to the Supreme Court of Tennessee for the purpose of reviewing the questions hereinbefore specified, and that upon review the judgment and decision of the Supreme Court of Tennessee be reversed, and that your Petitioners have such other and further relief as this Honorable Court may deem just.

Respectfully submitted,

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APPENDIX

Tennessee Statute Relating to Foreign Corporations

4118. *Foreign corporations admitted.*—All corporations, chartered or organized under the laws of other states and/or countries for any purpose whatsoever, may be admitted to this state to engage in business upon the terms and conditions below provided. (1929, ex. ses., ch. 13, sec. 1.)

4119. *Verification of charter.*—Before any such corporation shall engage in any character of intrastate business within this state, it shall file in the office of the Secretary of State a copy of its charter, duly authenticated by the certificate of its secretary or assistant secretary, under the corporate seal, if there be one, and if not, such fact shall be stated; or, in lieu thereof, such charter may be authenticated by the certificate, under seal, of the state official whose duty it is to record the original charter in the state in which such corporation is chartered. (Ib., sec. 2.)

4120. *Designation of statutory agents.*—Such corporation shall also designate some individual, firm or corporation, residing in this state and having an office or place of business open to the public, as its agent for the service of process upon it in all actions or suits brought against it in the courts of this state, the fact of such agency to be plainly designated, at the address given as the location of its agent, by such corporation, and such corporation shall at the time of filing such charter and appointing such agent, pay into the office of the Secretary of State the sum of three hundred dollars. (Ib., Modified.)

4127. *Domestication.*—When such foreign corporation shall have duly complied with the provisions of the foregoing sections, then it shall be entitled to all the privileges, rights, immunities, and subject to the liabilities of corporations organized and chartered under the laws of this state. (Ib., sec. 4.)

4128. *Penalties.*—It shall be unlawful for any foreign corporation to engage in intrastate business in this state without complying with the foregoing sections, and such

corporations shall forefeit and pay to the State of Tennessee a penalty of not less than one hundred dollars nor more than five hundred dollars, such penalty to be fixed by the jury trying the case. Actions for the recovery of such penalties shall be instituted and prosecuted by the attorney-general on behalf of the State of Tennessee by civil suit before any court of competent jurisdiction. Each day during which any such corporation engages in business without so complying with the provisions of this chapter shall constitute a separate violation. (Ib., sec. 5.)

4129. *Construction.*—The provisions of this chapter shall not apply to corporations engaged exclusively in interstate commerce, nor to insurance companies duly qualified to do business in this state under the provisions of law. (Ib., sec. 6, Modified.)

(7149)